

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ELIZABETH MARGRABE,

Plaintiff,

-against-

SEXTER & WARMFLASH, P.C., DAVID
WARMFLASH and MICHAEL PRESENT,

Defendants.

STATE OF NEW YORK)
)
) ss:
COUNTY OF NEW YORK)

A. MICHAEL FURMAN, being duly sworn, deposes and says:

1. I am a member of the law firm of Kaufman Borgeest & Ryan LLP, attorneys for defendants Sexter & Warmflash, P.C., David Warmflash and Michael Present (hereinafter “defendants” or “Sexter & Warmflash”) in the above-captioned matter, and am fully familiar with the facts and circumstances herein based upon my review of the file maintained by my office. I submit this affidavit in opposition to plaintiff’s motion for a stay of the instant action pending resolution of a proceeding in Supreme Court, Westchester County.

2. By Notice of Motion dated October 26, 2007, this office moved, on behalf of the defendants, to dismiss the instant action pursuant to Rule 12(b)(6) Fed.R.Civ.P., on the ground that the Complaint fails to state a claim upon which relief can be granted since: (1) *res judicata* and collateral estoppel bars plaintiff’s claims; (2) the statute of limitations bars plaintiff’s claims; and (3) plaintiff’s Complaint fails to state a cognizable cause of action as a matter of law.

3. In support of the motion to dismiss, I submitted an affidavit dated October 26, 2007. Exhibits “A” – “Q” were annexed to the October 26, 2007 affidavit as follows:

Case No.: 07 CV 2798
(KMK) (GAY)

AFFIDAVIT OF
A. MICHAEL FURMAN

- A true and correct copy of plaintiff's Complaint in the above-captioned matter was attached as Exhibit "A"
- A true and correct copy of plaintiff's underlying Complaint - from the action entitled "Elizabeth Margrabe and Anthony Rusciano III, et al. v. Anthony J. Rusciano, II et al.," Supreme Court, Westchester County, Index No. 10032/01 - was attached as Exhibit "B."
- A true and correct copy of the June 18, 2003 transcript of proceedings from the underlying action was attached as Exhibit "C."
- A true and correct copy of plaintiff's June 20, 2003 power of attorney appointing William Margrabe to serve as plaintiff's attorney-in-fact was attached as Exhibit "D."
- A true and correct copy of underlying correspondence *inter alia* between Mr. Margrabe and "co-counsel" was attached as Exhibit "E."
- A true and correct copy of further underlying correspondence *inter alia* between Mr. Margrabe and "co-counsel" was attached as Exhibit "F."
- A true and correct copy of the March 17, 2005 Decision and Order of Justice Kornreich (Supreme Court, New York County, Index No. 107569/04) was attached as Exhibit "G."
- A true and correct copy of a 12-page, single-spaced letter *inter alia* "firing" defendants, sent to defendants on April, 9, 2004, was attached as Exhibit "H."
- A true and correct copy of defendants' underlying May 14, 2004 Order to Show Cause for an attorney charging lien in the underlying action was attached as Exhibit "I."

- True and correct copies of plaintiff's June 24, 2004 Memorandum of Law and Affidavits of Harry Lewis, Elizabeth Margrabe, and William Margrabe were attached as Exhibit "J."
- True and correct copies of plaintiff's June 24, 2004 cross motion and the supporting Affidavit of Harry Lewis were attached as Exhibit "K."
- A true and correct copy of the September 1, 2004 Decision and Order of Justice Donovan was attached as Exhibit "L."
- A true and correct copy of the January 4, 2007 Appellate Division, First Department decision of Sexter & Warmflash, P.C. v. Margrabe, 38 A.D.3d 163, 828 N.Y.S.2d 315 (1 Dept., 2007) was attached as Exhibit "M."
- A true and correct copy of the October 28, 2004 Decision and Order of Justice Donovan was attached as Exhibit "N."
- True and correct copies of cover pages of the underlying fee hearing transcript of proceedings from December 20, 2004, February 10, 2005, April 1, 2005, and June 1, 2005 were attached as Exhibit "O."
- A true and correct copy of the underlying July 9, 2007 Decision and Order (Westchester County, Index No. 10032/01) was attached as Exhibit "P."

- A true and correct copy of the decision of Lipani v. Collins, Collins & Dinardo, P.C., 1992 WL 168267, *3 (S.D.N.Y. 1992) was attached as Exhibit "Q."

Dated: New York, New York
November 9, 2007



A. Michael Furman

Sworn to before me this
9th day of November 2007



Notary Public

BETSY PHILIP
Notary Public, State of New York
No. 02PH6139327
Qualified in Nassau County
Commission Expires:

CERTIFICATE OF SERVICE

This is to certify that true and correct copies of the foregoing: **AFFIDAVIT OF A. MICHAEL FURMAN** was served via first class mail and ECF on the 9th day of November 2007 upon:

William Greenberg, Esq.
Greenberg & Massarelli, LLP
2929 Purchase Street
Purchase, New York 10577



A. MICHAEL FURMAN